



DATE: March 3, 1989
CASE NO. 88-INA-27

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT
CERTIFICATION UNDER THE
IMMIGRATION AND NATIONALITY ACT

WANG WESTLAND INDUSTRIAL CORPORATION,
Employer

on behalf of

ZU-GAO HUANG
Alien

Leo Raychuk, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill,
Schoenfeld, and Tureck,
Administrative Law Judges

NICODEMO DeGREGORIO
Administrative Law Judge

DECISION AND ORDER

Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) ("Act") provides that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such work; and (2) the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review as contained in the Appeal File, (A1-A61), and written arguments of the parties. 20 C.F.R. § 656.27(c) (1988).

Statement of the Case

Wang Westland Industrial Corporation ("Wang") was formed in February of 1985 and started doing business in May of 1985. (A13). However, as of October 1986 Wang did not employ any worker. As of this date, Chung Ning Ho was President and one-third shareholder of the corporation, and had invested \$10,000.00 in it; Hall P. Tam was Vice-President, Secretary, and one-third shareholder of the corporation, and had "loaned" \$50,000.00 to it; Zu-Gao Huang, the Alien, was the remaining one-third shareholder, but had not paid for his shares. (A14, A30).

When the corporation was formed, in February of 1985, Huang was a resident of the People's Republic of China and was engaged in the import/export business, e.g., selling, buying and manufacturing hand paintings and replicas of ancient Chinese artifacts, and importing electronic components. (A12). Apparently, at the very creation of the corporation it was contemplated that the corporation would apply for labor certification in behalf of Huang. In fact, Huang signed on March 1, 1985, a statement of his qualifications which is Part B of the Application for Alien Employment Certification, and the corporation filed the application for labor certification in behalf of Huang in September of 1985, after advertising his job in June of 1985. (A11, A12, A8).

The corporation has offered Huang the position of Manager/Artisan, the duties of which are described as follows:

Managerial: Negotiate with buyers and sellers and supervise contracts regarding the import from the People's Republic of China to U.S. of serigraphs, brass replicas and other Chinese craftworks, and the export from U.S. to People's Rep. of China of American industrial sewing machines, Japanese auto parts, Ford Motor Co. engines and other electronic components.

Artistic: Design and manufacture Chinese-style serigraphs, brass replicas of ancient Chinese artifacts and hand-painted watercolors on silk with Oriental motifs for distribution in U.S.

The requirements for the position are three years of high school, one year of experience in the job, and fluency in Chinese as well as familiarity with U.S. Chinese trade restrictions and Chinese business practices. (A11). Huang's qualifications include three years of general high school in Shanghai, fluency in Chinese, and experience in manufacturing, selling, and buying hand paintings of Chinese artifacts, as well as importing electronic components. (A12).

On July 14, 1987, the Certifying Officer issued a Notice of Findings, proposing to deny labor certification on the ground, among others, that the job opportunity involves a combination

of duties. Pursuant to 20 C.F.R. § 656.21(b)(2)(ii), Wang was required to document (1) that it normally employed persons for that combination of duties, or (2) that workers customarily performed the combination of duties in the area of intended employment, or (3) that the combination of duties arose from business necessity. (A39).

In rebuttal, Wang stated that since its inception the corporation had devoted its energy to the cultivation and expansion of two markets: the Chinese market for U.S. automobiles, trucks, limousines, and automotive parts, and the U.S. market for Chinese artworks, in particular replicas of ancient Chinese artifacts. (A44). Because Wang is a new and small company, the rebuttal goes on to say, it would be economically infeasible to hire two workers, one for the supervision and production of Chinese artworks and the other for the conduct of trade between China and the United States. Huang fits the position perfectly, since he is an accomplished artisan and an established businessman in China. On September 10, 1987, the Certifying Officer denied labor certification on the ground that Wang had not justified the combination of duties, as required by the Notice of Findings. Wang has requested review of this determination. Both Wang and the Certifying Officer, by respective counsel, have filed briefs, which have been duly considered.

Discussion

We have serious doubts that the position offered to Huang is a "job opportunity," *i.e.*, a job opening for employment to which U.S. workers can be referred. 20 C.F.R. § 656.50. It appears that the position of Manager/Artisan and the requirements for it have been specially designed for Huang, and that the labor certification process is being used as a vehicle for transferring Huang's business from China to the United States. However, since Wang has not been given the opportunity to be heard on this issue, we shall put it aside.

The Certifying Officer found, and Wang does not deny, that the position of Manager/Artisan is a combination of two jobs. Accordingly, Wang was given the opportunity to justify the combination in one of three ways, as provided in § 656.21(b)(2)(ii). Wang did not state that it has normally, or ever, employed persons for that combination of duties. Wang did not state that other workers in the New York City area customarily perform a similar combination of duties. Wang's explanation of the business necessity for the combination of duties consists of a statement that it seeks two markets and it cannot afford to hire more than one worker.

Setting aside the issue of the appropriate definition of business necessity under § 656.21(b)(2)(ii), conclusory assertions of an employer do not constitute sufficient documentation in response to a Notice of Findings. See Venture International Associates, Ltd., 87-INA-569 (January 13, 1989). Wang's assertions that it would be economically infeasible to hire two workers are unexplained and unsupported. Wang has not shown that it could not afford to hire two workers. Based on the Employer's insufficient response to the Notice of Findings, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby
AFFIRMED.

NICODEMO DeGREGORIO
Administrative Law Judge

Washington, D.C.
ND/jsp